(1) Supreme Court, U.S.
FILED

001613 MAR - 6 2001

No. Or...

IN THE

SUPREME COURT OF THE UNITED STATES

MARCUS A. BEASLEY--- PETITIONER

vs.

SODEXHO USA, INC., et al --- RESPONDENT(S)

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

MARCUS A. BEASLEY
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Pro Se Petitioner

29pp

QUESTION(S) PRESENTED

1. **Why is the 4th Circuit's opinion different than the Fifth Circuit and the Supreme Court with regard to Discharge for Same Misconduct or Crime in which a minority and non-minority both participated?**

2. **Why did the 4th Circuit not apply the law 7.5(A) (LAW GOVERNING MARYLAND EMPLOYERS) when the Plaintiff admits that he had performance problems or that he was engaged in Misconduct , the nature of his Prima Facie case changes." Why was this section of the law not applied in this case?**

3. **Would major inconsistencies as to basic facts between the Defendant's deposition and the deposition of Plaintiff's immediate supervisor constitute fair doubt in the minds of a reasonable jury?**

4. **Why did the 4th Circuit not allow an amendment of retaliation to be added by the plaintiff during his deposition?**

5. **Why would the Fourth Circuit disallow a retaliation claim during discovery and post employment when critical evidence supporting retaliation was revealed during this process?**

6. **How could the 4th Circuit clearly indicate that Plaintiffs job performance was satisfactory in March, 1997, but disregard a written warning given by the Defendant one month prior stating the contrary?**

7. **Why did the Fourth Circuit in it's operative facts conclude that the defendant and John Horton (Plaintiff's immediate supervisor) were of equal rank?**

8. **What would the High Court consider a hostile discriminatory work environment with regard to the number of discrimination complaints?**

LIST OF PARTIES

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject this petition is as follows:

David Healey Regional Operations Manager

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OPINIONS AND ORDERS BELOW

The per curiam opinion of the United States Court of Appeals For the Fourth Circuit is unpublished. It is copied in the Appendix hereto. (App. At 1)

Petitioner is not aware of any reported opinions or orders of the trial Court, the United States District Court for the District of Maryland, Bearing upon the questions presented by this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 06, 2000. The jurisdiction of this court to review that judgment is invoked under 28 U.S.C., sec. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner submits that the following constitutional provisions and Statutes are involved:

U.S. Consti., - Title VII of the Civil Rights Act of 1964 2000e
U.S. Consti., Title VII Section 704(a)

Their pertinent text is set out in the Appendix hereto. (App. 2)

STATEMENT OF THE CASE

The main issues at hand involved in this case are as follows:

1. A minority and non-minority were in the same position, experienced the same performance issues, had the same managers and employees, yet the non-minority employee was never given a written warning and was transferred or re-assigned; while the minority employee was written up twice and terminated.
2. During employment, the Defendant admits to keeping computer notes specifically on plaintiff. However, the plaintiff did not find out about this until post employment during discovery and the Defendants deposition in which the administration period had passed. Therefore, based on logic, it is clearly evident that an adverse condition of employment had taken place and retaliation should be allowed to proceed in this case
3. Plaintiff reported to Defendant about non-minority's racial epitaphs in workplace on two occasions; Defendant labels Plaintiff as an instigator, issues Plaintiff a written warning and terminates Plaintiff 1 month later.
4. The testimonies of Defendant and John Horton are the exact opposite which leads to a genuine issue for trial.
5. Plaintiff receives a satisfactory performance review in March by his immediate supervisor. 1 month prior, the Defendant gives the Plaintiff a written warning about performance issues and does not consult with his subordinate (Horton) about Horton's evaluation of the Plaintiff.
6. In it's operative facts, the 4th Circuit clearly makes a crucial error when it states,"' It appears that Horton and Healey are equal in rank".
7. Disrict Court states, " Cook v. CSX Transp. Corp., 988 F. 2d 507, 511 (4th

Cir. 1993) that Plaintiff has not produced evidence sufficient to create a dispute of fact with respect to element (2) and (3). The record indicates that seven months prior to the May 5, 1997 written warning, Sodexho twice disciplined and then terminated John Ruyak, a white cafeteria manager for poor performance."

Although, the 4th Circuit's Judgment Order indicates Sodexho twice disciplined and terminated John Ruyak ; the fact is, the disciplinary action and ultimate termination was executed by Alicia Dixon Sledge (African American manager) who was subsequently terminated 1 month after she initiated these actions. It should be noted that Defendant David Healey was not assigned to this account during the Ruyak/Sledge incident.

The Defendant started approximately 5 weeks later.

Plaintiff's discrimination case is centered around David Healey's actions with comparison to Karl Gartman and Marcie Blatt. Plaintiff only worked with John Ruyak for 1 month and Defendant was not yet assigned.

District Court seems to take as fact the Defendants evidence without weighing the inconsistencies and the disputed evidence submitted by the Plaintiff.

1. Question 1:
In Defendant's letter dated Nov. 22, 1997 Mr. Healey writes: "The cafeteria feeding area was only producing average sales of $3,800 per day on a budget of $4,400 AND WAS IN NEED OF MORE FOCUSED ATTENTION. AT THAT TIME KARL GARTMAN (WHITE) WAS MANAGING the cafeteria under Mr. Beasley' s direction. Due to the CONTINUED POOR FINANCIAL PERFORMANCE, I RESTRUCTURED THE RETAIL MANAGEMENT FOR THE DEPARTMENT AND REMOVED MR. GARTMAN FROM THE OPERATION, JANUARY 1997. AFTER MR. GARTMAN WAS RE-ASSIGNED, I MADE THE DECISION TO REALIGN MR BEASLEY'S MANAGEMENT PRIORITIES".
Mr. Healey later also writes," In addition to not meeting sales targets the cafeteria operation was not MEETING CUSTOMER EXPECTATIONS. THE OPERATION WAS NOT OPEN FOR BUSINESS ON TIME, ITEMS PUBLISHED ON THE MENU WERE INCONSISTENTLY PROVIDED, AND THE ATTITUDES OF THE STAFF DID NOT MEET SERVICE ATTITUDE EXPECTATIONS, IMPLEMENT SYSTEMS TO MAINTAIN THE EXPECTATION. MR BEASLEY'S CHARGE WAS TO CORRECT THOSE DEFIENCIES".
It is clear that there was serious substandard performance in the cafeteria in which a non-minority was directly responsible. However, **the non-minority was never written up but rather transferred to another Sodexho account**.

Mr. Healey writes at the end of his letter," **MR BEASLEY WAS ASKED TO RESIGN HIS POSITION** IN THE CAFETERIA DUE TO INCONSISTENCIES IN THE CAFETERIA OPERATION, NOT COMPLYING WITH STANDARDS SET FORTH AND COMMUNICATED, INABILITY TO DEMONSTRATE SUSTAINED PROGRESS ON THOSE PREVIOUSLY STATED EXPECTATIONS."

THIS CLEARLY IS A VIOLATION OF TITLE VII. In the leading case of McDonald v. SantaFe Trail Transp. Co.,[242] the plaintiff alleged that he was discharged for alleged misappropriation of cargo, but a fellow employee of a different race was similarly implicated in the misappropriation was not discharged. The employer argued that the complaint of discrimination should be dismissed solely because the plaintiff was involved in serious misconduct for crime. The Supreme Court disagreed. They stated," that while the employer may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be applied alike to members of all races, and Title VII is violated if, as petitioner's alleged, it was not."[243] The Supreme Court noted that in order to establish a prima facie case, **the plaintiff need not establish a precise equivalence in culpability between himself and the employee retained: rather he need only establish that employees involved in acts against the employer of "comparable seriousness" were nevertheless retained** [244]

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[242] 427 U.S. 273 (1976).
[243] Id. At 283.
[244] Id. At 283 n. 11.

In Polanco v. City of Austin, a Hispanic police officer had been discharged for testifying inaccurately regarding a false confession while a white officer guilty of virtually the same misconduct had merely been given a written reprimand, the Fifth Circuit concluded that evidence of discriminatory atmosphere and a biased investigation, had SUPPORTED A FINDING OF DISCRIMINATION.
Mr Healey admitted that a report written by Steve Brush reflected negatively on Marcie Blatt (white) during the time Plaintiff was employed, yet Blatt was not disciplined. Healey Tr. at 179-181.
In conclusion, Karl Gartman, who is white, was responsible for managing the Sodexho cafeteria between October and February 1997, a time during which cafeteria operations were substandard, Gartman was never disciplined for his lack of performance. The reason Defendant Healey gives for not having disciplined Karl Gartman, who is white and has never complained about discrimination, is that Gartman did not report directly to him. Healey Tr. at 192. However, when Healey was disciplining Plaintiff Beasley for inconsistencies, Plaintiff did not report to him either.

QUESTION 2

The Fourth Circuit in it's summary judgment indicates that,"Plaintiff admits that he had performance shortcomings related to his management of the areas for which he was responsible. These included problems related to customer service, consistency of business hours, product quality, availability and employee attitudes." (exact same issues as Gartman) Defs' Ex. 1 at 236-37, 240-41, 250,274-77; Ex 11. According to Maryland Employment Law, when the discharged Plaintiff admits that he was not performing his job in a satisfactory manner or that he was engaged in misconduct, the nature of his prima facie case changes.

In this situation, the Plaintiff must prove that similarly situated employees of a different race or sex were performing in a comparable manner or engaged in comparable misconduct but were not severely disciplined. In such cases, their prima facie case has been reformulated as follows:

1. He is a member of a protected group;
2. A company policy or practice existed concerning the activity for which he was discharged;
3. Non-minority employees either were given the benefit of lenient company practice or not held to compliance with a strict company policy;
4. The minority plaintiff was treated differently in that he was not given the benefit of a lenient policy, and was held to compliance with a strict policy.

It is obvious that Marcie Blatt and Karl Gartman had recognized performance problems in the same position that the Defendant was aware of yet he failed to discipline them.

Defendant testified that Blatt was disciplined and that the discipline should be found in her personnel file. There was no such discipline. Horton Tr. at 38; Healey Tr. at 156-157.

Question 3

The Fourth Circuit states in Ross v. Communications Satellite Corporation 759 F2d 355 (1985)," the nonmoving party must produce specific facts showing a genuine issue for trial, the Court defined genuineness as evidence creating fair doubt." These contradictions in the Defendant's own testimony along with the contradictory testimony of Plaintiff's immediate supervisor will no doubt create fair doubt in the minds of a reasonable jury.

1. Defendant Healey admitted during his deposition that Sodexho's Managers Guide and Employment Handbook prohibited retaliating against employees who raise issues of race discrimination and such retaliation included treating them differently, yet he treated Plaintiff differently by keeping notes on him because he filed an EEOC complaint. Healey Tr. at 8-9 , 46.
2. Defendant Healey states on one hand that Marcie Blatt had no input in discipline or terminations. Healey Tr. at 52. Yet he contradicted that testimony by admitting that he considered Blatt's input when he disciplined Plaintiff. Healey Tr. at 56, 76.
3. Healey testified that he followed the procedures in the Sodexho Managers Guide and Employee Handbook when he disciplined Plaintiff. Healey Tr. at 81. He again contradicted his own testimony when he admitted that he violated Sodexho policy by not notifying human resources about Plaintiff's race discrimination complaint. Healey Tr. at 141. A similar contradiction was evident when Healey said that he counseled with Sodexho human resources each time he disciplined Plaintiff. Healey Tr. at 82
4. Healey testified that he had to approve all evaluations, yet in later testimony he claims that he

did not know how John Horton had evaluated Plaintiff. Healey Tr. at 82.

5. Healey testified on one hand that he did not discipline employees who did not report directly to him, that it was their manager's responsibility to evaluate their employees, yet he personally disciplined Plaintiff who did not directly report to him but reported to John Horton. Horton Tr. at 17, Healey Tr. at 89-90.

6. Healey admitted, on one hand, that non-discrimination was insured by Consultations with human resources, but also admitted that he never told HR about Plaintiff's complaints of racial discrimination. Healey Tr. at 125, 141.

7. Healey testified that he did not give written discipline to anyone other than Plaintiff . Healey Tr. at 128. Later in his deposition he claimed that he did, in fact, discipline Marcie Blatt who is white and that the discipline should be found in her personnel file. Healey Tr. at 156-157 230. It was not. Horton Tr. at 38.

8. Although Defendant Healey testified during his deposition that Beasley co-employee, Barbara Hicks, did not confirm Plaintiff's allegation of race discrimination at Sodexho, Healey Tr. at 133, Healey's computer notes clearly state that Ms. Hicks did in fact, confirm Plaintiff's allegation relating to derogatory racial remarks being made by Marcie Blatt. Healey Depo. Exh. 3 page 6.

9. While Defendant Healey contends that Plaintiff's performance was consistently below standard, Healey Tr. at 188, John Horton, who was responsible for evaluating Plaintiff, contradicts this view as does Plaintiff's written performance evaluation. Horton Tr. at 19, Horton Depo. Exh. 1.

10.Healey admits that he failed to follow Sodexho policy, disciplined Plaintiff after Plaintiff complained about race discrimination and referred to Plaintiff as an "instigator." Healey Tr. at 142-143.

11. In Healey's letter to Neile Grady Martin Nov. 22, 1997 Healey states," The Cafeteria Operation under Plaintiff was not meeting customer service expectation." Exhibit C. Yet, when Defendant Healey met with the cafeteria workers on April 25, 1997, shortly before Plaintiff's termination, he congratulated them because the customer survey had increased to 88%. Healey Depo. Exhibit 3 page 3. His note dated April 25, 1997, states: I reviewed with the staff that the customer satisfaction surveys had increased to 88% and that they needed to be congratulated and feel proud of their accomplishments." Defendant Healey made no such comments to Plaintiff Beasley although he managed cafeteria operations.

12. Healey claims during his deposition that he himself trained his managers informally on a "daily" basis and if Plaintiff was available he too received this training. John Horton contradicted this testimony by saying that Defendant Healey spent little time on site at the UM account. Someone's testimony is incredible and its up to a jury to determine which. This evidence as applied to the de minimus burden required of Plaintiff To establish a prima facie case is sufficient to allow Plaintiff's race Discrimination and retaliation claims to proceed to trial. Bowman v. United States Environmental Protection Agency, 712 F. Supp. 375, 381-82 (S.D.N.Y. 1989). Also June 12, 2000 see Reeves v. Sanderson Plumbing Products, Inc., Sup. Ct. No. 99-536, Decided.

QUESTION 4&5

The Fourth Circuit indicates in summary judgment that," Plaintiff is barred from raising the retaliation claim because it was not a part of the charge of discrimination filed with EEOC." Then the Fourth Circuit list all of the cases within it's jurisdiction without referencing a higher court and/or another Circuit's ruling.

According to Maryland Law 7.5(C) the strong prohibition against retaliation is not conditioned upon the merit of the claim of discrimination. Similar protections against retaliation are set forth in Age Discrimination in Employment Act and article 49B of the Maryland Code. Even if the claim is meritless, the employee cannot be retaliated against for making the claim. Complainants also are protected against retaliation even if their protest does not rise to the level of a formal charge of discrimination. Informal protest of discrimination , such as **voicing a complaint to a supervisor or using an employer's grievance procedure, are protected activities, and employers cannot take any adverse action against an employee who complains about what he perceives to be discrimination.** In cases where a Plaintiff claims he was unlawfully discharged in retaliation for filing a discrimination charge or for otherwise protesting against discrimination, the plaintiff must establish the following elements of a prima facie case:

1. That he engaged in protected activity;
2. That the employer took adverse employment action against him;
3. That the employer was aware of the protected activity, and
4. That a causal connection existed between the protected activity and the adverse action.

PLAINTIFF'S PROOF OF RETALIATION

1. Filed EEOC charge against former employer. Also complained to Defendant about discrimination in the cafeteria.
   Defendant Healey began keeping notes on Plaintiff in January of 1997, when a co-employee told him that Plaintiff had filed an EEOC charge against another food service company, Aramark. Healey Tr. 8-17
   Plaintiff Beasley complained to Defendant on two occasions regarding Discrimination in caferteria. Healey Tr. at pg. 132, 4-14
2. Defendant started to keep computer notes on Plaintiff specifically. Healey Tr. 8-17.
   When Plaintiff complained about discrimination in cafeteria, Defendant had several employees to keep Plaintiff under surveillance. (document enclosed in file). Documenting Plaintiff from April 3-7. Also Plaintiff received a 2nd written warning on May 5th, 1997. Healey Tr. at 192 17-21
3. Defendant found out about protected activity from Michael Bowman co-worker in the account. Healey states," when I created these computer notes specifically on Mr. Beasley, it had come to my attention through second, third party that Mr Beasley was talking in the cafeteria about how he was filing an EEOC complaint against Aramark. The person I was working with heard that comment, relayed that comment to me and said, "David if you are counseling Mr. Beasley you had better keep documentation. That's when I started."
   Defendant knew about discrimination complaint in cafeteria because Plaintiff went directly to him.
4. The causal connection is Defendant labels Plaintiff as an instigator in his Computer notes. He started documenting Plaintiff because of his protected activity against Aramark and he admits it.

Also he gives Plaintiff a written warning on may 5th , 1997 3 weeks after the complaint of discrimination in the cafeteria. A complaint substantiated by Barbara Hicks and Joanne Merritt. Merritt Depo. #8. Healey Depo. Exh. 3 page 3.

In Munday v. Waste Management EEOC clearly states," the surveillance constitutes an "adverse action" that is likely to deter protected activity, and is unlawful if it was conducted because of Plaintiff's protected activity.

The Eighth Circuit has found,' the court wrote, " that periods of time between Statutorily protected activity and adverse employment actions longer than the three-month period in the instant case were sufficient to create an inference of the requisite causal connection." Additional circumstantial evidence of causation included evidence that management knew about protected activity, and that the employee had thereafter been investigated more closely and punished more severely than others for a certain violation of company rules and Performance standards. That same evidence of unequal treatment provided adequate evidence to support the jury's finding of pretext, the court held.

The employer's shifting explanations for the Plaintiff's discharge created a triable issue of fact with regard to pretext, the Ninth Circuit held, reversing summary judgment on a retaliation claim. In granting summary judgment, the United States District Court of Montana had discounted inconsistencies in the employer's explanation by reasoning that they all came under the general Court's explanation--- "insubordinate behavior"--- that the employer had relied upon.(District Court's opinion was published at 911 F. Supp. 1299.)Disagreeing, the Ninth Circuit emphasized substantial differences between the explanations advanced by the employer at various times, even Though it might have been possible to class them all under the heading of subordination." It may be that Norwest's shifting explanations are acceptable, "the

Ninth Circuit wrote."**However, such weighing of the evidence is for a jury, not a judge.**" The Court emphasized that," the Plaintiff need produce very little evidence of discriminatory motive to raise a genuine issue of fact as to pretext. **Payne v. Norwest Corp.** (9th Cir. 1997).

Supreme Court Judge Thomas stated in Robinson v. Shell Oil," nowhere in Title VII is either phrase used—even where the specific context otherwise makes clear an intent to cover current or former employees."

With this in mind, the Plaintiff could not include retaliation in his charge of discrimination because he was unaware that this adverse action had taken place. He was not made aware of this issue until discovery and the Defendant's Deposition. If we follow Judge Thomas' opinion then Plaintiff should be allowed to proceed with a charge of retaliation.

Question 6

The Fourth Circuit states," this evidence does indicate that Plaintiff initially performed satisfactorily, at least based upon Horton's evaluation. Nonetheless, Healey (Plaintiff's other supervisor) evaluated Plaintiff's performance and determined that Plaintiff was not performing satisfactorily." Summary Judgment page 11 2nd paragraph.

Consider this evidence, we agree according to the Fourth Circuit that Plaintiff was performing well in his duties in March 1997. If this statement is weighted then the written warning dated on February 19, was pretext for discrimination because:

1. John Horton states in his Affidavit," that he was the General Manager of the account and was responsible for the day to day operations." Affidavit #2
2. John Horton also states, " that he was responsible for evaluating Mr. Beasley's performance and disciplining him if necessary." Affidavit #3
3. John Horton continues to say, "Mr. Beasley received a merit increase and on **March 19th, 1997, I gave him a satisfactory performance evaluation. As of March 19, 1997, Mr. Beasley met my performance expectations."** Affidavit #7
4. John Horton says," during my entire time of my employment with Sodexho, David Healey never told me he objected to my satisfactory evaluation of Mr. Beasley's performance." Affidavit #13
5. With regard to the Defendant's observation of Plaintiff John Horton says," David Healey spent little time on site at the account and did not even have a full time office there. He spent little time observing employee performance." Affidavit #12
6. Most important, John Horton indicates," it is not true that Mr. Beasley's

performance was consistently below standards or that there were regular or routine inconsistencies in his performance when he was cafeteria manager.
Most inconsistencies were beyond his control and others were resolved satisfactorily." Affidavit #17

7. To substantiate the point of the last statement John Horton says," The customer surveys and my day to day observations of Mr. Beasley's performance demonstrated to me that his performance was at least satisfactory." Affidavit #16

This evidence disputes the written warning given in February, 1997, by the Defendant, it is clear that Plaintiff was performing his job satisfactorily.
However, during this time Defendant had learned about Plaintiff's protected activity. His decision to issue Plaintiff a written warning during this time in the minds of any reasonable jury would conclude pretext for Discrimination and Retaliation.
Finally, when Defendant Healey was asked in his deposition," if the performance evaluation that Mr. Beasley received was meets expectation, and he's given that by his manager who reports to you, and he believes by having received that his performance was average, isn't him receiving something else from you an inconsistency to him relative to his performance?
Answer: I can see how that would cause some confusion. Healey Depo. Page 100, 5-18.

Question 7
In the deposition of David Healey the questioning went as follows, "
Q On 3-19-97, did Mr. Horton report to you?
A Yes
Q He was one of your managers?
A Yes," Healey Depo. Page 247, 2-5
In addition to the deposition of John Horton, this is a serious mistake on the part of the Fourth Circuit involving the Discrimination and Retaliation.
Both the Defendant and John Horton makes very clear who is the immediate supervisor and who is the superior.
When the Fourth Circuit says, "It appears that Horton and Healey were equal in rank, and they reported to Chris Jackson, Sodexho's Vice President" is a grave error in understanding the facts. This is a vital point in this case because David Healey disciplined the Plaintiff for inconsistencies but failed to discipline the non-minority for the same inconsistencies. Yet, he indicated he did not discipline the non-minority because he did not report directly to him. As the evidence clearly shows that on March 19, 1997 Plaintiff did not directly report to him either.

Question 8
In Harris v. Forklift Systems, Inc., the Supreme Court clarified the nature of a "hostile work environment" under Title VII of the Civil Rights Act.
The Court resolved a conflict among the different Circuits by ruling that an employee has an actionable claim for hostile environment harassment even when the conduct complained of has not resulted in serious psychological injury. Reaffirming its earlier decision in Meritor Savings Bank v. Vinson, the Court stated that a workplace permeated with discriminatory conduct sufficient "to alter the conditions of the victim's employment" violates Title VII, regardless of whether such conduct causes tangible psychological injury.

1. John Horton states, "between 1996 and 1997, when I left, many employees, Mainly cafeteria workers, complained about race discrimination at the University of Maryland Medical Center, Food and Nutrition Services Dept. that was contract managed by Sodexho. Affidavit #9
2. "I recall hearing use of and complaints about, derogatory remarks about black employees and/or black people." Affidavit # 10
3. "The complaints of race discrimination, which were very common and known to upper management, related to working conditions and disparity in discipline."
4. "Race relations was an issue throughout my tenure at Sodexho's UMMS account. I brought the issue to the attention of my boss Chris Jackson and to Human Resources, but nothing was done." Affidavit # 23
5. Joann Merritt states in her deposition, "I complained about how black employees were being treated to Neile Grady Martin in Human Resources before I was terminated, but nothing was done. Affidavit #5

This is very strong and compelling evidence that Sodexho knew about the racism and they condoned it because of the lack of concern and follow-up. Many employees, not just the Plaintiff voiced a concern of discrimination and unequal treatment during 1996 and 1997.

REASONS FOR GRANTING THE PETITION

Of the 5 to 6 million African Americans residing within the jurisdiction of the Fourth Circuit(largest black population of all Circuits) it is vital that this Petition be granted because of the conservatism and the strict application of the law that will discourage all future protected activities.

There are many reasons that this Petition should be granted, that among these are:

1. African Americans all across the country are put in comparable or the same positions as non-minority co-workers, with the same set of circumstances, yet they are governed by the strictest of policies and standards; while the white co-worker is governed by a more lenient policy or standard. This issue definitely needs to be addressed again as a 21st century standard for all Circuits.. McDonald v. Sante Fe Transp Co.(1976)
2. It must be emphasized in all Circuits that the State Law Governing Employers need to be adhered to regarding specific scenarios within individual cases. The Supreme Court **must set a standard of how the State Laws are to be applied, not at the discretion of a Circuit Court Judge but a consistent application of the Law based on submitted evidence.** For example, it is a talked about issue among African Americans that Circuit Court Judges only will allow a certain percentage of cases to pass summary judgment. This type of thinking discourages protected activity. Therefore, the Court must set a standard of application based on uniqueness of each individual case and not the traditional standard as was evident in this case. In plain terms have the Law fit the case and not the case fit the Law. In this case, the case was to fit the law and not the other way around. According to

Maryland Law Governing employers, when the Plaintiff admits to substandard performance his prima facie case changes.This did not happen in this case. This needs to be brought to the attention of the Fourth Circuit because the employer could always articulate the reasons for termination and they could always be classified as insubordinate behavior.

3. The Supreme Court is going to have to clarify "reasonable doubt" in all of the Circuits because according to the Fifth Circuit in Polanco v. City of Austin sufficient evidence existed for the jury to conclude that disparity in discipline had emanated from a discriminatory motive. Also the Ninth Circuit said, " that the District Court had discounted inconsistencies in the employer's explanations." Also the Ninth Circuit stated, "substantial differences in testimony by the employer is for a jury to decide not a Judge." It is imperative for the Supreme Court to communicate and establish a precedence to the Fourth Circuit to encourage protected activity.
4. The issue of "adverse employment action" needs to be defined. The First, Seventh, Ninth, Tenth, Eleventh and D.C. Circuits have all rejected the "ultimate employment decision" standard followed by the Fifth and Eighth Circuits. Likewise, they have found conduct sufficiently adverse to support retaliation claims when it would appear to fall short of the "material" or "tangible" effect followed by the Second, Third, Fourth and Sixth Circuits. For example, in Johnson v. Dimario , 1998 U.S. Dist. LEXIS 12678, *4 (D.D.C.1998) a written reprimand, which can serve as foundation for future corrective action, is sufficient adverse action to support Title VII retaliation claim.

The meaning of the term "employee" has been defined in Robinson v. Shell Oil, to include current and former employees. Therefore, in this case it is clearly obvious that the

Plaintiff did not know about the surveillance being conducted by his co-workers and his Immediate supervisor's boss. (defendant)

This is a critical issue because many minorities involved in a protected activity could be monitored daily more closely than non-minorities causing an adverse employment action and they are completely unaware. When they become aware, it is essential for them to be able to raise a claim of retaliation during post employment. (Although the retaliation took place before the administration period, it was not known until post employment and after the filing deadline had passed)

For the reasons stated herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Marcus A. Beasley

Pro Se Petitioner

Supreme Court, U.S.
FILED
(2)
001613 MAR - 6 2001
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

MARCUS A. BEASLEY

v.

SODEXHO USA, INC., et al – RESPONDENT(S)

The Appendix To The Petition For Writ Of Certiorari
To The 4th Circuit Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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4/01

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-2070

MARCUS BEASLEY,

Plaintiff – Appellant,

versus

SODEXHO USA, INCORPORATED; DAVID HEALEY,

Defendants – Appellees

Appeal from the United States District Court for the District of Maryland, at Baltimore. Marvin J. Garbis, District Judge. (CA-99-1313-MJG)

Submitted: November 30, 2000
Decided: December 6, 2000

Before NIEMEYER, LUTTIG, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Marcus Beasley, Appellant Pro Se. Todd James Horn, VENABLE, BAETJER & HOWARD, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The following is the text of Title VII of the Civil Rights Act of 1964, as Amended, as it appears in volume 42 of the United States Code, beginning at section 2000e. Title VII prohibits employment discrimination based on race, color, religion, sex and national origin. The Civil Rights Act of 1991 amends several sections of Title VII. In addition, section 102 of the CRA amends the Revised Statutes by adding a new section following section of 1977 (42 U.S.C. 1981), to provide for the recovery of compensatory and punitive damages in cases of intentional violations of Title VII, the Americans with Disabilities Act of 1990, and section 501 of the Rehabilitation Act of 1973.

SECTION 704 (a) OF TITLE VII

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...To discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

MARYLAND EMPLOYMENT LAW 7.5(A)

In most discharge cases, the critical question is not whether an employee engaged in misconduct or performed in an unsatisfactory manner, **but whether employees of the opposite race or sex, who engaged in the same misconduct or performed similarly, were disciplined in the same manner.** When the discharged plaintiff admits that he was not performing his job in a

satisfactory manner or that he was engaged in misconduct, the nature of his prima facie case changes. In this situation, the plaintiff must prove that similarly situated employees of a different race or sex were performing in a comparable manner or engaged in comparable misconduct but were not as severely disciplined. In such cases, their prima facie case has been reformulated as follows:

1. He is a member of a protected group;
2. A company policy or practice existed concerning the activity for which he was discharged;
3. **Non-minority employees either were given the benefit of lenient company practice or not held to compliance with a strict company policy;**
4. **The minority plaintiff was treated differently in that he was not given the benefit of a lenient policy, and was held to compliance with a strict policy.**

MARYLAND EMPLOYMENT LAW 7.5(C) DISCHARGES IN RETALIATION FOR FILING COMPLAINT OF DISCRIMINATION

Informal protest of discrimination, such as voicing a complaint to a supervisor or using an employer's grievance procedure, are protected activities, and employer's cannot take any adverse action against an employee who complains about what he perceives to be discrimination.

In cases where a plaintiff claims that he was unlawfully discharged in retaliation for filing a discrimination charge or for otherwise protesting against discrimination, the plaintiff must establish the following elements of a prima

Facie case:

1. That he engaged in protected activity;
2. That the employer took adverse employment action against him;
3. That the employer was aware of the protected activity, and
4. That a causal connection existed between the protected activity and the adverse action.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

*

Marcus Beasley

*

Plaintiff

* Civil Action No:
MJG-99-1313

v.

*

Sodexho USA, Inc, et al.

*

Defendant

*

* * * * * * * * * * * * * *

AFFIDAVIT OF CHRISTELL ROSS

The Affidavit, Christell Ross, hereby deposes and states as follows:

1. I worked at Sodexho's UMMS account as Subway Manager from August 1996 until... I have a degree in Food Service Management from Cheyney University, where I graduated Cum laude.
2. At the time of my employment, David Healey was Sodexho's Regional Manager.
3. While employed at Sodexho, I felt that Blacks were treated less favorably than whites as to training received, benefits given and other terms and conditions of employment. For example, Blacks who were considered as having performance problems were terminated or laid off, while Sodexho made a great effort to find jobs for a white employee whose performance was questionable. Marcie Blatt and Jerry Hammer, who are white, are

good examples as compared to Marcus Beasley and myself, who are black. Although Blatt and Hammer had recognized performance problems, they were not disciplined or terminated. Marcus Beasley and I were.

4. White managers were given longer periods to find permanent housing when they transferred to Baltimore and expense monies that Blacks, such as myself, were denied. Whites had use of corporate credit cards, but black managers did not.
5. Black employees were terminated in greater numbers than blacks, including Marcus Beasley, Joann Merritt, Alicia Dixon Sledge, ...

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

*

Marcus Beasley

*

Plaintiff

*

Civil Action No.:
MJG- 99-1313

v. *

Sodexho USA, Inc, et al.

*

Defendants

*

* * * * * * * * * * * * *

AFFIDAVIT OF JOHN HORTON

The Affidavit, John Horton, thereby deposes and states as follows:

1. I was employed by Sodexho at its University of Maryland food service account (UMMS) between the fall of 1996 until April 1997.
2. I was General Manager of the account and was responsible for the day-to-day operations.
3. All Sodexho food service employees reported to me either directly or indirectly including Marcus Beasley.
4. I was responsible for evaluating Mr. Beasley's performance and disciplining him if necessary.
5. I reported to Chris Jackson, Regional V.P., who is white. David Healey, Regional Manager, who is white, reporrted either to Jackson or Fred Obrien, who is also white.
6. Neil Grady Martin, who is white, was Director of Human Resources.

7. In January 1997, Mr. Beasley received a merit increase and on March 19, 1997, Mr. Beasley met my performance expectations.
8. At the time of my employment at Sodexho I was not aware of any written policy the company had concerning race discrimination or retaliation.
9. Between 1996 and 1997, when I left, **many employees, mainly cafeteria workers, complained about race discrimination at the University of Maryland Medical Center, Food and Nutrition Services Department that was a contract** managed by Sodexho.
10. **I recall hearing use of and complaints about, derogatory remarks about black employees and/or black people.**
11. **Although I did talk to Mr. Beasley about cash handling problems of employees under him, these problems were not severe enough for him or anyone else to have been terminated.**
12. David Healey spent little time on site at the account and did not even have a full time office there. He spent little time observing employee performance.
13. **During the entire time of my employment with Sodexho, David Healey never told me he objected to my satisfactory evaluation of Mr. Beasley's performance.**
14. To my knowledge, Carl Gartman was the only full time person brought to the account to help Mr. Beasley.
15. During my employment, one way we judged employee performance was through customer surveys. Such surveys were considered important and those conducted while Mr. Beasley was cafeteria manager were favorable to him.
16. The customer surveys and my day to day observations of Mr. Beasley's performance demonstrated to me that his performance was at the least satisfactory,

17. **It is not true that Mr. Beasley's performance was consistently below standard** or that there were regular or routine inconsistencies in his performance when he was cafeteria manager. Most inconsistencies were beyond his control and others were resolved satisfactorily.

18. **I got the impression that David Healey did not personally like Marcus Beasley.**

19. Although, on December 30-31, 1996 and February 13 1997, I did talk to Mr. Beasley about certain aspects of his performance that could be improved, these issues were resolved by March 19, 1997 when I evaluated him. Also, if there were extenuating circumstances, then discipline would be inappropriate.

20. Employees other that Mr. Beasley were subject to discipline. For example, Frank Valenza had a bad temper, which affected his performance.

21. **The complaints of race discrimination, which were very common and known to upper management, related to** working conditions, pay and **DISPARITY IN DISCIPLINE**.

22. I raised the issue of pay disparity at Sodexho and recall that Carl Gartman was being paid extra after being transferred to the University of Maryland.

23. **Race relations was an issue throughout my tenure at Sodexho's UMMS account. I brought the issue to the attention of my boss Chris Jackson and to Human Resources, but nothing was done.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

*

Marcus Beasley

*

Plaintiff

*

Civil Action No.:
MJG- 99-1313

v. *

Sodexho USA, Inc, et al.

*

Defendants

*

* * * * * * * * * * * * *

AFFIDAVIT OF JOANN MERRITT

The Affidavit, Joann Merritt, thereby deposes and states as follows:

1. I was employed as cafeteria manager at Sodexho's UMMS account in Baltimore, Maryland from June 1, 1997 until I was discharged on August 30,199_.
2. I am a black female.
3. During the brief period of my employment, I noticed that I and other black employees were treated differently than our white co-workers. For example, we were not given the support that whites were given to be successful in our jobs and whites were transferred to other assignments regardless of their performance while blacks were either laid off or terminate.
4. Marcie Blatt, who is white, was never disciplined although she refused to help me on many occasions.

5. I complained about black employees were being treated to Neile Grady Martin in Human Resources before I was terminated, but nothing was done.
6. **Two other employees complained about how I was being treated to David Healey, the Regional Manager, but Healey also took no action.**
7. When I was terminated, allegedly because of budgetary reasons, positions which I could have been transferred to existed at five other customer accounts.
8. Marcie Blatt would refer to black employees as "them" and would ask, "how do you deal with them." I thought such comments were race related and told her so. Nothing was done about my complaints, but I was terminated.

A Yes
Q Did you make a habit of making notes on your computer relative to employment matters?
A In specific occasions, yes I did.
Q Is this something you did every day?
A No.
Q What would be the circumstances that would lead you to making a computer note of some kind?
A When I created these computer notes on –**specifically on Mr. Beasley, it had come to my attention through second, third party that Mr. Beasley was talking in the cafeteria about how he was filing an EEOC complaint against Aramark. The person I was working with heard that comment, relayed that comment to me and said, David, if you are counseling Mr. Beasley, you had better keep documentation. That's when I started.**
Q And when was that in time?
A It had to have been late winter, probably March.
Q Of what year?

performance appraisals during the rating period for the University of Maryland Medical Center. It was not my responsibility, therefore I wouldn't have asked for them, nor looked at them, signed them, filled out the request for increases or anything else.

Q So it's your testimony that you didn't know what or how Mr. Horton had evaluated Mr. Beasley on March 19th of 1997? Is that your testimony, sir?

A Yes. And that Mr. Horton had performed that appraisal many months prior to that and hadn't had the performance appraisal signed and submitted to corporate.

Q So when you disciplined Mr. Beasley subsequent to the date on which he received that performance evaluation, you not only didn't know, but you did not do anything to find out how he had been rated by Mr. Horton, is that true?

A The answer is yes. Was that important to the recent performance levels, no.

Q So how his manager evaluated him on March 19th of '97 was not important to you?

A John Horton reported to me from November of '96 through when John Horton left. Yes.

Q And during that same time Mr. Beasley reported to Mr. Horton.

A That's correct.

Q So Mr. Horton and Mr. Beasley were in your operation?

A Yes.

Q And them being in your operation means that you were ultimately responsible for their performances during the period from November of '96 through the dates that they left, is that true?

A Yes.

Q Did you see the performance evaluation that Mr. Horton did on Mr. Beasley during the period that Mr. Beasley was employed in your Operation?

A No.

Q You testified a moment ago that you signed all performance evaluations?

A For the ones that I had responsibility for. And I did not have responsibility for the

A I had finished.
Q On 3-19-97, did Mr. Horton report to you?
A Yes.
Q He was one of your managers?
A Yes.
Q He was acting on your behalf?
Mr. Horn: Object to the form of the question.
Q You may answer.
A At that point in time, yes.
Q Yes. Now with that in mind, how was Mr. Beasley getting consistent feedback when on the one hand one of your managers was telling him he had met expectations, and on the other hand you were saying he had a performance problem?
Mr. Horn: Objection. The question has been asked and answered.
Q Let me rephrase it.
A No.
Q Let me rephrase it.

Q What was the performance of the cafeteria during that period?

A Fair.

Q And Mr. Gartman is white; correct?

A Yes.

Q Did you ever discipline Mr. Gartman for his performance in the management role of the cafeteria during that period that you now say was fairly managed?

A Mr. Gartman didn't report to me. Mr. Gartman reported to Mr. Beasley.

Q Did you discipline Mr. Gartman for his performance in that position?

A No. Mr. Gartman reported to Mr. Beasley.

Q Would you now turn to the – I think it's E, the performance Warnings. I want to go to the one that you received on May 5th.

Do you see that?

A Yes, sir.

Q When did you first decide to give Mr. Beasley that warning?

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

*

MARCUS BEASLEY

*

Plaintiff

* CIVIL ACTION

NO. MJG-99-1313

vs.

*

SODEXHO USA, INC., et al.

*

Defendants

* * * * * * *

JUDGMENT ORDER

For the reasons stated in the Memorandum and Order issued this
date:

1. Judgment shall be, and hereby is, entered in favor of Defendants Sodexho USA, Inc. and David Healey against Plaintiff Marcus Beasley with prejudice and with costs.
2. Any and all prior rulings against any parties are incorporated by reference herein.
3. This Order shall be deemed to be final judgment within the Meaning of Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this 14th day of June, 2000.

Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

*

MARCUS BEASLEY

*

Plaintiff

* CIVIL ACTION

NO. MJG-99-1313

vs.

*

SODEXHO USA, INC., et al.

*

Defendants

* * * * * * *

MEMORANDUM AND ORDER

The Court has before it defendant's Motion for Summary Judgment And the materials submitted by the parties relating thereto. The court finds a hearing unnecessary.

I. BACKGROUND

A. Operative Facts

Plaintiff Marcus Beasley ("Plaintiff" or "Beasley"), an African American, was employed by Defendant Sodexho USA, Inc. ("Sodexho") as a Cash Operations Manager from August 7, 1996 to June 2, 1997 when Plaintiff's employment was terminated. [1]

1 Sodexho informed Plaintiff of its decision to discharge Plaintiff, but gave him the option of resigning, which he accepted. Under the circumstances the Court shall, for purposes of discussion, consider Plaintiff's resignation as a termination of employment by Sodexho.

Plaintiff supervised Sodexho's food services[2] at the University of Maryland Medical Center ("the UMMC").[3] His duties included overseeing cash collection, cash register reconciliation, and overall operations[4] of the food services.

Plaintiff reported to the Director of Food Service, Dimitria Holland ("Holland"),[5] who in turn reported to John Horton ("Horton"), the General Manager. Horton evaluated Plaintiff's performance until April of 1997, when Horton left Sodexho. Horton Aff. II 17.

Horton found that Plaintiff had performance problems and Discussed with Plaintiff about proper cash-handling procedures

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2 These services included a cafeteria, a Subway sandwich shop, a Starbucks Coffee kiosk, a Pretzel Time kiosk, and a Healthy Choice kiosk. Plaintiff directly managed the Pretzel Time and Healthy Choice kiosks. The cafeteria, the Subway shop, and the Starbucks kiosk were managed by, respectively, Karl Gartman, Christel Ross, and Mimi Lackey, who reported to Plaintiff.

3 Sodexho provides a variety of outsourcing services (including food service, housekeeping, and maintenance) to the corporate, healthcare, and education markets. Defs' Ex. 4 at 28-29, 169-70. Sodexho entered into a contract with the UMMC to provide food service and housekeeping functions. Id.

4 For example, Plaintiff was responsible for making sure that (1) the food service areas were clean and opened and closed on time, (2) the advertised merchandise was available and properly displayed, and (3) the employees who worked in these areas conduct themselves properly. Defs' Ex. 5; Ex 1 at 27, 79, 140-41, 196-201, 213.

5 Holland was later replaced by Marcie Blatt.

"on numerous occasions." Defs' Ex. 9. On one occasion, Horton discovered that Plaintiff had approved a deposit without verifying the amount, which was over by nine dollars. Def's Ex. 9. On December 31, 1996, Horton issued Plaintiff a written warning for failing to follow Sodexho's cash-handling procedures. Id.

Plaintiff also admits that he had other performance shortcomings related to his management of the areas for which he was responsible. These included problems related to customer service, consistency of business hours, product quality and availability, and employee attitude. Defs' Ex. 1 at 236-37, 240-41, 250, 274-77; Ex. 11.

In spite of these performance problems, Plaintiff received a two-percent salary increase in February of 1997[6] and a satisfactory performance evaluation from Horton in March of 1997. Horton's affidavit states that although in December of 1996 and February of 1997 he discussed with Plaintiff "certain aspects of his performance that could be improved, these issues were resolved." Horton Aff. 19. Thus, on March 19, 1997, Horton evaluated Plaintiff's performance and gave Plaintiff a "Meets expectations" rating.

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[6] Moreover, in the customer surveys conducted in February of 1997, some customers gave favorable ratings to the cafeteria's food quality, cleanliness, atmosphere, and service. Defs' Ex. 24; Ex. 1 at 452-53.

The record indicates that Horton was not the only supervisor evaluating Plaintiff's performance. Plaintiff also received feedback on his performance from Defendant 'David Healey ("Healey"), the Regional Operations Manager. [7] Thus, at least during the period from November of 1996 through April of 1997 (when Horton left Sodexho, both Horton and Healey had supervisory authority over Plaintiff and evaluated his performance.

The record indicates that Horton and Healey[8] dealt with

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[7] In late 1996, Sodexho's profitability at the UMMC declined. Sodexho took several steps to improve the situation. Sodexho assigned David Healey to the UMMC location specifically to identify and correct problem areas. Defs' Ex. 1 at 118-19, 151, 175-77, 245-50, 253-55. In addition, Sodexho changed the structure of the food service department. In October of 1996, Sodexho terminated John Ruyak ("Ruyak") (the white cafeteria manger) for poor performance and replaced him Karl Gartman (a white employee) . Defs" Ex.1 at 187-90, 205-06, 213-15, 218-19, 238-39, 262-63, 265-66; Ex. 6 at 44-45, 69-70; Ex. 7 3-4. In January of 1997, Sodexho eliminated the Director of Food Service position after terminating the incumbent Dimitria Holland, a white employee, for performance problems. Id. In February of 1997, Sodexho removed Gartman from the cafeteria manager's position and reduced the number of assistant cafeteria managers from three to two. Id. Plaintiff then replaced Gartman as cafeteria manager after Sodexho removed the Starbucks and Subway Kiosks from Plaintiff allegedly because they had financial problems under Plaintiff's supervision. Id. ; Defs' Ex. 1 at 27, 238-39; Ex. 7. Plaintiffs job title and pay did not change. Id.

[8] It appears that Horton and Healey were equal in rank, and they reported to Chris Jackson, Sodexho's Vice President.

Plaintiff's performance problems differently. As discussed Above, Horton considered these problems, but viewed Plaintiff's overall performance as satisfactory. Healey, however, independently[9] determined that Plaintiff was not meeting the company's expectations. Healey kept a record of Plaintiff's performance problems from February to April of 1997 and discussed with Plaintiff about a corrective action plan. See Defs' Exs. 12-15.

On May 5, 1997, Healey gave Plaintiff a written warning for failing to set up the cafeteria on time, to follow cash-handling procedures, and to schedule employees properly. Defs' Ex 16; Ex. 1 at 363-65. Subsequently, Healey discovered that Plaintiff erroneously submitted a cash reconciliation worksheet with errors because he had not accurately recorded the opening cash register reading from May 12, 1997, which should have been the closing reading from May 11, 1997. Defs' Ex. 18, Ex 1 at 422.
Finally, on May 29, 1997, Plaintiff signed a cash-reconciliation worksheet on May 26, 1997 that indicated a shortage of fifteen cents but which actually had a shortage of $31.11. Defs' Ex. 17; Ex. 1 at 418-22.

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9 Apparently, Healey never discussed Plaintiff's work performance with Horton. Nor did Healey inquire about Horton's evaluation of Plaintiff's performance.

On June 2, 1997, Healey informed Plaintiff that his employment would be terminated because of poor work performance. Healey gave Plaintiff the option of resigning, which Plaintiff accepted. Defs' Ex 1 at 27-28, 427, 430; Exs. 19,20. In the same month that Plaintiff left Sodexho, he was replaced by JoAnn Merritt, an African American. Defs' Ex 1 at 27-28, 133-34.

B. Procedural History

On October 16, 1997, Plaintiff filed a charge of race discrimination with the Maryland Commission on Human Relations and with the Equal Employment Opportunity Commission ("EEOC"). On February 10, 1999, the EEOC Issued Plaintiff a notice of right to sue.

On May 6, 1999, Plaintiff timely filed this Complaint. The Complaint alleges that (1) Sodexho discriminated Against Plaintiff because of his race, in violation of the Civil Rights Act of 1964, as amended, 42 U.S.C. S 2000e et seq. ("Title VII"), and (2) Healey is personally liable for race discrimination against Plaintiff under 42 U.S.C. S 1981 ("Section 1981").[10] Plaintiff also alleges race discrimination by Defendants under both Title VII and Section 1981 in Connection with promotion

10 Sodexho and Healey shall be referred to collectively as "Defendants."

denial, discipline, demotion, compensation, expense reimbursement, and training.

On August 17, 1999, the Court issued an Order dismissing all of Plaintiff's Title VII claim, except his discriminatory discharge claim, on the ground that Plaintiff failed to raise them in the EEOC charge of Discrimination. See August 17, 1999 Mem. And Order. Thus, the only claims remaining in this case are (1) the discriminatory discharge claim under Title VII and (2) the claims of race discrimination under Section 1981 relating to discipline, demotion, promotion denial, compensation, training, and expense reimbursement.[11]

Defendants now move for summary judgment on Plaintiff's remaining claims under Rule 56 of the Federal Rules of Civil Procedure.

II. LEGAL STANDARD

A motion for summary judgment shall be granted if the pleadings and supporting documents "show that there is no genuine issue of material fact and that the moving party is entitled to a

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11 As discussed herein, Plaintiff's Answer to Defendants' Motion for Summary Judgment only addressed the claims of race discrimination in discharge, discipline, and training. Because Plaintiff has abandoned his claims of race discrimination in promotion denial, demotion, compensation, and expense reimbursement, the Court shall dismiss these claims.

judgment as a matter of law." Fed. R. Civ. P. 56 (c). The well-established principles pertinent to such motions can be distilled to a simple statement.

The Court must look at the evidence presented in regard to the motion for summary judgment through the non-movant's rose-colored glasses, but must view it realistically. After so doing, the essential question is whether a reasonable fact finder could return a verdict for the non-movant or whether the movant would, at trial, be entitled to judgment as a matter of law. E.g . Anderson v. Liberty Lobby, Inc. , 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); Shealy v. Winston, 929 F 2d 1009, 1012 (4th Cir. 1991).

III DISCUSSION

a. Title VII Race Discrimination Claim

1. In General

To establish that an employer has discriminated against its employee, a plaintiff may prove intentional unlawful discrimination by introducing "direct or indirect evidence relevant to, and of sufficient probative force to support as a reasonable probability, the inference that but for [his race] a different result would have occurred." Riley v. Technical &

Management Servs. Corp., Inc., 872 F. Supp 1454, 1460 (D. Md. 1995), aff'd, 79 F. 3d 1141 (4th Cir. 1996). In this case, Plaintiff has not come forward with any direct evidence and relies instead on circumstantial evidence. When a plaintiff presents no direct evidence of Discrimination, the Fourth Circuit has explained the Relevant analysis as follows:

> [His] discriminatory discharge claim [is] subject to the burden-shifting scheme of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and its progeny.... Assuming arguendo that [Plaintiff] has made a prima facie case of [race] discrimination, "the burden of production shifts to [the employer] to articulate some legitimate nondiscriminatory reason" for its action. O'Conner v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (1996) (internal quotation marks omitted). Once [the employer] meets this burden, [Plaintiff] must prove that [the employer's] proffered reason was mere pretext and that [race] was the real reason for [his]termination . See St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502, 507-08 (1993). To avoid judgment as a matter of law on this question, [Plaintiff] must establish a "legally sufficient basis for a reasonable jury to find for (him).Fed. R. Civ. P. 50(a). "[S]ummary judgment or directed verdict is mandated where the facts and the law will reasonably support only one conclusion." McDermott Int'l, Inc. v. Wilander, 498 U.S. 337,356 (1991).

Hawkins v. PepsiCo., Inc., 203 F.3d 274, 278-79 (4th Cir. 2000).

2. Prima Facie Case of Discriminatory Termination Under Title VII

Plaintiff alleges that Defendants unlawfully terminated his employment because of his race. Defendants contend, however, that they fired Plaintiff because of poor performance.

Plaintiff has the initial burden of making out a prima facie case of discriminatory termination. To establish a Title VII claim of discriminatory termination, Plaintiff must prove that

(1) he is a member of the protected group,
(2) he was discharged,
(3) he performed his job satisfactorily at the time of his discharge, and
(4) following his discharge he was replaced by someone of comparable qualifications outside the protected class.

Brinkley v. Harbour Recreation Club, 180 F. 3d 598, 607 (4th Cir. 1999); Farasat v. Paulikas, 32 F. Supp. 2d 249, 254 (D. Md.), aff'd mem., 166 F 3d. 1208 (4th Cir. 1998); Brown v. McLean, 159 F. 3d 898, 905-06 (4th Cir. 1998), cert. denied, 119 S. Ct. 1577 (1999).

In this case, Plaintiff has not established a prima facie case of discriminatory discharge. Specifically, while Plaintiff has established that he is a member of a protected class[12] and that he was discharged, [13] Plaintiff has failed to present evidence sufficient to create a dispute of fact that race was the

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12 Plaintiff is an African American and is, therefore, a member of the protected class.

13 See supra note 1 and accompanying text

reason for his discharge. To the contrary, there is substantial evidence in the record that Plaintiff's employment was terminated because of unsatisfactory work performance. Among the documented problems with Plaintiff's performance were that Plaintiff did not follow cash-handling procedures, that he failed to supervise properly the employees under him, and that he did not properly manage the operations of the food services for which he was responsible. Defs' Ex. 1 at 221, 310-13, 418 -23; Defs' Exs. 9, 12-15, 17, 18. Indeed, Plaintiff admits that he had these performance lapses. Id.

Plaintiff contends that, in spite of his performance problems, his job performance was deemed satisfactory. To support this contention, Plaintiff points out that (1) the customer surveys conducted in February 1997 were favorable to him, (2) he received a "Meets Expectations" performance rating in March of 1997. Defs' Ex. 1 at 452 -53. This evidence does indicate that Plaintiff initially performed satisfactorily, at least based upon Horton's evaluation. Nonetheless, Healey (Plaintiff's other supervisor) evaluated Plaintiff's performance and determined that Plaintiff was not performing satisfactorily.

The record indicates that Healey counseled Plaintiff about his performance problems several

times, both before and after Horton left Sodexho. Defs' Exs. 12-15. Thus, while Plaintiff's job performance was satisfactory in March of 1997, there is substantial evidence that Plaintiff eventually failed to meet his employer's expectations. Indeed, after Horton left Sodexho, Plaintiff received a written warning from Healey on May 5, 1997 for various performance problems. Plaintiff does not dispute this evidence,[14] which supports the position that Plaintiff's performance continued to erode by the time of Defendants' decision to terminate the employment. Thus, the mere fact that Plaintiff had done a satisfactory job earlier does not demonstrate that he was performing in a satisfactory manner in June of 1997, when he was fired. See O'Conner v. Consolidated Coin Caterers Corp., 56 F. 3d 542, 547 (4th Cir. 1995), rev'd on other grounds, 517 U.S. 878 aff'd on remand, 84 F. 3d 718 (4th Cir.), cert. denied, 117 S. CT. 608 (1996) (citation omitted) ("a 1984 evaluation, even if given in December of 1984, and a pay raise given at the start of 1985 was not relative to a discharge on May 1, 1985").

Furthermore, Plaintiff cannot establish element (4)- that He was replaced by someone outside of the protected class. Plaintiff was replaced by Joan Merritt, an African American, in

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14 Plaintiff also does not contend that Healey had any racial animus toward Plaintiff. Defs' Ex. 1 at 114

the same month Plaintiff's employment was terminated.

In view of the evidence presented by Defendant's, a reasonable fact finder could not conclude that Plaintiff was performing in a satisfactory manner when his employment was terminated in June of 1997, or that Plaintiff was replaced by a person outside the protected class. Accordingly, the Court concludes that Plaintiff has not carried his minimal burden of establishing a prima facie case. Nevertheless, for completeness, the Court will assume for Purposes of discussion, that Plaintiff had presented a prima facie case.

3. Defendants' Legitimate Reasons

Even if Plaintiff has carried his minimal burden of establishing a prima facie case, there is no doubt that Defendants have articulated a legitimate, nondiscriminatory reason for Plaintiff's termination. That is, as discussed above, Plaintiff was not performing satisfactorily. The burden thus shifts back to Plaintiff to come forward with evidence that Defendants proffered explanation is a pretext and that the real reason for his firing was race discrimination.

4. Proof of Pretext and Discrimination

Plaintiff has failed to come forward with evidence from

which a reasonable fact finder could conclude that the Defendants' justification was a pretext for illegal discrimination. Plaintiff alleges that his employment was terminated even though he was performing satisfactorily.
Because Plaintiff's performance was not the reason for his discharge, Plaintiff reasoned, race discrimination must be what motivated Defendants to fire Plaintiff. However, as discussed above, Defendants determined, and Plaintiff admits, that Plaintiff had work performance problems. Moreover, any allegations of race discrimination is negated by the fact that Plaintiff was replaced by an African American.

In sum, Plaintiff has failed to come forward with evidence from which a reasonable fact finder could conclude that Defendants' proffered justifications for Plaintiff's termination were pretextual and that Plaintiff was the victim of race discrimination. Accordingly, Plaintiff's discriminatory termination claim shall be dismissed.

B. Retaliation claim

In his Answer to Defendants' Motion for Summary Judgment, Plaintiff sets forth a new allegation that he was
retaliated against for exercising his rights. Specifically, Plaintiff alleges that he complained several times about "derogatory

remarks" made by Marcie Blatt, his immediate supervisor, and Plaintiff's employment was terminated because he made such complaints. See Pl's Answer at 10-13.

Without reaching the merits of the retaliation claim, the Court finds that Plaintiff is barred from raising the claim for Several reasons. First, the retaliation claim was not contained in the charge of discrimination filed with EEOC. Crosten v. Kamauf, 932 F. Supp. 676, 683 (D. Md. 1996) (employee's failure to file charge of retaliation bars her from suing employer for retaliation where challenged conduct occurred before she filed EEOC charge) ; Riley v. Technical and Management Services Corp., Inc., 872 F. Supp. 1454, 1459-60 (D. Md. 1995) (same). Second, Plaintiff's complaint does not allege a retaliation claim. See Pl's Compl.; Hughes v. The New Baltimore City Board of School Commissioners,___ F. Sull. 2d ___, n.2 (D. Md. Oct. 21 1999) (Defs' Ex 30). Finally, Plaintiff never requested leave to amend the Complaint to add the retaliation claim, and the deadline of July 30, 1999 for amending pleadings has long passed. See June 15, 1999 Scheduling Order; Wildauer v. Frederick County, 993 F. 2d 369, 372 (4th Cir. 1993). Accordingly, the Court concludes that Plaintiff is barred from raising the retaliation claim.[15]

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15 Even if the Court allowed Plaintiff to amend his Complaint to add the retaliation claim, it appears that Plaintiff cannot make out a case of retaliation. To establish a prima facie case of retaliation, Plaintiff must show that (1) the plaintiff engaged in a protected activity, (2) the employer took an adverse employment action against the plaintiff, and (3) a causal connection exists between the protected activity and the adverse action. Ross v. Communications Satellite Corp., 759 F 2d. 355, 365 (4th Cir. 1985), overruled on other grounds, 490 U.S. 228 (1989). In this case, assuming that Plaintiff complained to Healey about race discrimination (a protected activity), and that Plaintiff's employment was terminated on June 2, 1997, Plaintiff has established a protected activity followed by adverse employment action. However, Plaintiff has presented no evidence that would demonstrate a causal connection between his protected activity and the adverse employment action taken against him. The mere fact that Plaintiff's termination occurred after his protected

C. Plaintiff's Claims Under Section 1981

Under Section 1981, a Plaintiff must prove that he was discriminated against "solely because" of his race. Runyon v. McCrary, 427 U.S. 160 (1976); Saint Francis v. Alkhazraji, 481 U.S. 604 (1987). This standard appears to be higher than that applicable to Title VII, under which Plaintiff need only prove that "race was a determinative factor in the adverse employment decision." Fuller v. Phipps, 67 F. 3d 1137, 1144 (4th Cir. 1995). However, the Court finds it unnecessary to discuss whether the standard for Section 1981 claims higher than that for Title VII claims, because Plaintiff's claims do not

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activity is insufficient on its own to prove a causal connection between the two. See Olivares v. NASA, 934 F. Supp. 698, 705 (D. Md. 1996). Furthermore, the record indicates that Defendants had numerous problems with Plaintiff's performance well before Plaintiff's employment was terminated. Therefore, Plaintiff cannot establish a prima facie case of retaliation.

meet either standard. Thus, for purposes of discussion, the Court shall apply the supposedly more lenient Title VII standard to Plaintiff's Section 1981 claims.

1. Discriminatory Discipline

Plaintiff alleges that the written warning he received on May 5, 1997 was motivated by race discrimination. Defendants contend that the warning was issued because of Plaintiff's performance problems.

To establish a prima facie case of discriminatory discipline, Plaintiff must prove that

(1) he is a member of a protected class,
(2) he engaged in prohibited conduct that was comparable in seriousness to misconduct of employees outside the protected class, and
(3) the disciplinary measures enforced against him were more severe than those enforced against employees outside the protected class.

Cook v. CSX Transp. Corp., 988 F. 2d 507, 511 (4th Cir. 1993). In this case, Plaintiff has not produced evidence sufficient to create a dispute of fact with respect to elements (2) and (3). The record indicates that seven months prior to the May 5, 1997 written warning, Sodexho twice disciplined and then terminated John Ruyak, a white cafeteria manager, for poor performance. Defs' Ex 1 at 455-58; Exs. 25, 28. Plaintiff has not presented

any evidence to show that he was singled out for discipline because of his race. Therefore, the evidence presented by Plaintiff is insufficient to allege a prima facie case of discriminatory discipline.

Even assuming that the evidence was sufficient to make out a prima facie case of discriminatory discipline, the Court nevertheless would dismiss the claim because Plaintiff has not presented evidence sufficient to create a dispute of fact that Defendants' reason for issuing Plaintiff a written warning was a pretext for race discrimination. Plaintiff admits that he engaged in the misconduct for which he was disciplined. Defs' Ex 1 at 236-37, 240-41, 250, 274-77, 431-32. Moreover, Plaintiff does not allege that Healey, who issued the subject written warning, had exhibited any racial bias against Plaintiff.

The Court concludes that Plaintiff failed to present evidence sufficient for a reasonable jury to conclude that Defendants engaged in discriminatory discipline. Accordingly, the discriminatory discipline claim shall be dismissed.

2. Demotion Discrimination

Plaintiff alleges that Defendants' removal of Plaintiff's responsibility over the Subway and Starbucks kiosks in February of 1997 constituted unlawful discriminatory demotion. Defendants

contend that they did so because these kiosks faced financial problems under Plaintiff's supervision. Defendants have moved for summary judgment on this claim. Plaintiff's Answer to Defendants' Motion for Summary Judgment does not address the claim and, therefore, does not oppose summary judgment on the claim. Accordingly, Plaintiff's demotion discrimination claim shall be dismissed.

3. Promotion Denial

Plaintiff claims that in January of 1997 he was denied a promotion to the Director of Food Service position because of his race. Defendants move for summary judgment on this claim. Plaintiff's Answer to Defendants' Motion for Summary Judgment does not address the claim. Thus, the Court concludes that Plaintiff does not oppose summary judgment with respect to this claim. Accordingly, Plaintiff's promotion denial claim shall be dismissed.

4. Compensation Discrimination

Plaintiff alleges that he was paid less than white employees because of his race. Defendants move for summary judgment on this claim. Plaintiff's Answer to Defendants' Motion for Summary Judgment does not address the claim. Accordingly, the Court

concludes that Plaintiff does not oppose summary judgment with respect to this claim and shall dismiss the claim.

5. Training Discrimination

Plaintiff claims that he was denied training because of his race. Defs' Ex 1 at 526. Specifically, Plaintiff alleges that he was denied training on Sodexho's philosophy, quality management style and cash operation concepts.

Plaintiff's training discrimination claim is without supporting facts. First, Plaintiff admits that he received publications from Sodexho upon being hired that contained the very information he sought to learn. Id. At 525-27. Moreover, although Plaintiff alleges that he inquired generally about training, he admits that he never requested any specific training. Defs' Ex 1 at 528-30; Evans, 80 F. 3d. at 959-60 (failure to apply precludes discrimination action). Finally, Plaintiff has not presented any facts to support the allegation that white employees received training that he allegedly was denied. Defs' Ex 1 at 531-32.

The Court concludes that Plaintiff has not presented evidence sufficient for a reasonable jury to find that he was denied training because of his race and that such denial constitutes an adverse employment decision. See Porter v.

National Con-serv., Inc., 51 F. Supp. 2d. 656, 658 (D. Md. 1998), aff'd mem., 173 F. 3d. 425 (4th Cir. 1999) (Plaintiff's claim that he was denied training is not acceptable under Title VII because it did not involve "ultimate employment decisions"); Briggs v.dalton, 984 F. Supp. 350, 351 (D. Md.), 129 F. 3d 1258 (4th Cir 1997) (plaintiff's allegations that she was not given training appropriate to her position was not an adverse employment action under Title VII). Accordingly, Plaintiff's expense discrimination claim shall be dismissed.

6. Expense Reimbursement Discrimination

Plaintiff alleges that he was denied expense reimbursement because of his race. Defs' Ex 1 at 534. Defendant moves for summary judgment on this claim. Plaintiff's Answer to Defendants' Motion for Summary Judgment does not address this claim. Therefore, the Court concludes that Plaintiff does not oppose summary judgment on this claim. Accordingly, Plaintiff's expense discrimination claim shall be dismissed.

IV. CONCLUSION

For the foregoing reasons:

1. Defendants Sodexho USA, Inc.'s and David Healey's Motion for Summary Judgment is GRANTED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

*

Marcus Beasley

*

Plaintiff

*

Civil Action No.:
MJG- 99-1313

v. *

Sodexho USA, Inc, et al.

*

Defendants

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JUDGMENT ORDER

For the reasons stated in the Memorandum and order issued this date:

1. Judgment shall be, and hereby is, entered in favor of Defendants Sodexho USA, Inc. and David Healey against Plaintiff Marcus Beasley with prejudice and with costs.
2. Any and all prior rulings against any parties are incorporated by reference herein.
3. This Order shall be deemed to be a final judgment within the meaning of Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this 14th day of June, 2000.

Marvin J. Garbis
United States District Judge